

Exhibit 26

Page 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
INDEX NO. 10 Civ 1245 (LDW) (ETB)

ANTHONY BAFFO,

Plaintiff,

-against-

NEW YORK INSTITUTE OF TECHNOLOGY, ROBERT RIZZUTO, in his official and individual capacities, and LEONARD AUBREY, in his official and individual capacities.

Defendants.

85 Fifth Avenue
New York, New York

June 22, 2011

10:10 a.m.

DEPOSITION of STEPHEN KLOEPFER, a
Non-Party Witness in the above-entitled
action, held at the above time and place,
taken before Jennifer Brennan, a Notary
Public of the State of New York, pursuant
to Subpoena.

<p>1 2 APPEARANCES: 3 THOMPSON WIGDOR & GILLY, LLP Attorneys for Plaintiff 4 85 Fifth Avenue Fifth Floor 5 New York, New York 10003 6 BY: MATTHEW D. GORMAN, ESQ. BASIL SITARAS, ESQ. 7 NICOLETTE VAIRO, INTERN 8 FULBRIGHT & JAWORSKI, LLP 9 Attorneys for Defendants 666 Fifth Avenue 10 New York, New York 10103 11 BY: NEIL G. SPARBER, ESQ. 12 * * *</p> <p>13 14 15 16 17 18 19 20 21 22 23 24 25</p>	<p>Page 2</p> <p>1 2 STEPHEN KLOEPFER, the 3 Witness herein, having first been duly 4 sworn by the Notary Public, was examined 5 and testified as follows: 6 EXAMINATION BY 7 MR. GORMAN: 8 Q Good morning, my name is Matt 9 Gorman, from the law firm Thompson Wigdor 10 and Gilly. With me is my colleague, 11 Basil Sitaras. And as you know, we 12 represent the plaintiff, Anthony Baffo, 13 in this case against New York Institute 14 of Technology, as well as Robert Rizzuto 15 and Len Aubrey. 16 I asked you here this morning 17 to answer a couple of questions regarding 18 his claims. And first I want to go 19 through a couple general instructions. I 20 assume you're familiar with these, but I 21 want to go through them anyway. 22 You realize that today you are 23 testifying under oath? 24 A I do. 25 Q If you could just wait, I</p>
<p>1 2 STIPULATIONS 3 IT IS HEREBY STIPULATED AND AGREED, by 4 and among counsel for the respective 5 parties hereto, that the filing, sealing 6 and certification of the within 7 deposition shall be and the same are 8 hereby waived; 9 IT IS FURTHER STIPULATED AND AGREED 10 that all objections, except as to form of 11 the question, shall be reserved to the 12 time of the trial; 13 IT IS FURTHER STIPULATED AND AGREED 14 that the within deposition may be signed 15 before any Notary Public with the same 16 force and effect as if signed and sworn 17 to before the Court. 18 * * *</p> <p>19 20 21 22 23 24 25</p>	<p>Page 3</p> <p>1 2 S. Kloepfer 3 understand that many times you're going 4 to know exactly where I'm going with the 5 question, but so the court reporter is 6 able to get everything and the record is 6 clear -- 7 A That's fine. 8 Q -- wait to answer until I 9 finish my question. Thank you. 10 Going along with that, we have 11 a court reporter here and she'll be 12 recording your testimony, so it's 13 important that all of your answers are 14 verbal. No uh-huh, no nods of the head, 15 yes or no answers, something concrete. 16 Do you understand that? 17 A I understand. 18 Q If you don't hear or understand 19 the question, please let me know and I'll 20 repeat it. 21 Do you understand? 22 A I do. 23 Q If I use a term you do not 24 understand, please tell me immediately 25 and I'll try to rephrase it. Same goes</p>

2 (Pages 2 - 5)

VERITEXT REPORTING COMPANY

212-267-6868

www.veritext.com

516-608-2400

<p>1 S. Kloepfer 2 this reorganization. 3 Q And posting a job description 4 doesn't fall into the auspices of 5 thinking about hiring? 6 A It does, but you have to work 7 in an HR department to understand how 8 complicated it can be. But it is the 9 truth, that not having a director of HR, 10 slowed down the resolution of this matter 11 or the execution of this matter, plus 12 many of the other issues on Kloepfer 13 Exhibit 5 because I, as general counsel, 14 wanted to be sure that the HR component 15 of these decisions was fully in play, 16 which I cannot be sure until the new 17 director of HR showed up. 18 Q And if this was a 19 reorganization that Mr. Aubrey now wanted 20 done ASAP and had been contemplating for 21 sometime and presumably would have wanted 22 it done during that time, you would 23 rather to have him wait throughout the 24 entirety of that time, until a new HR 25 director --</p>	<p>Page 126</p> <p>1 S. Kloepfer 2 Mr. Aubrey wait throughout the entire 3 summer until an HR director was hired to 4 implement a plan that he wanted to 5 implement since that time? 6 A No, it may well have been 7 Mr. Aubrey's preference as well, to have 8 a director of HR in place, to give him 9 comfort that this reorganization was done 10 properly. 11 Q So it's possible that 12 Mr. Aubrey and yourself were not 13 comfortable with the people in HR, the 14 six or seven employees handling this 15 reorganization? 16 A I didn't say that either. The 17 answer to that is no. What I am saying 18 is those things that could wait for the 19 new director of HR because the 20 responsible manager in this case, 21 Mr. Aubrey, was satisfied with it 22 waiting, wait. Now, if Mr. Aubrey came 23 to me to general counsel and said, Steve, 24 I don't care, this thing has to be done 25 in August or September, we would have</p>
<p>1 S. Kloepfer 2 A I didn't say that. 3 Q Could you wait until I finish 4 my question. 5 A I'll do that, but then you need 6 to ask more precise questions that don't 7 seek to put words in my mouth. I'll do 8 that, if you reciprocate. 9 Q It's a question, you can say 10 yes or no and you need to let me finish 11 in order to get to the end of the 12 question. 13 A Read back the question, will 14 you please? 15 Q I'm not trying to put words in 16 your mouth. 17 A Ma'am, could you read back the 18 question and I'll give a monosyllabic 19 answer to the question. 20 Q I wasn't finished with the 21 question. 22 A Can you try to make the 23 question fewer than 50 words, that would 24 be helpful. 25 Q Would you rather have had</p>	<p>Page 127</p> <p>1 S. Kloepfer 2 found a way to get it done in August or 3 September. He did not do that. 4 However, he knew, of course, 5 that the new director of HR was in place. 6 And now he wanted it done and we got it 7 done as quickly as we could. But the 8 fact that the new general -- the new 9 director of HR was in place, was a reason 10 that now it needed to get done 11 immediately because we didn't have the 12 reason anymore that we don't have a 13 director of HR. 14 Q So it only became something to 15 be done ASAP, once Ms. Jablonsky was 16 hired? 17 A No, I didn't say that either. 18 What I'm saying, Mr. Aubrey, knowing 19 there was a new director of HR in place, 20 wanted it done ASAP, which we did. 21 Q Do you believe he wanted it 22 done ASAP because Ms. Jablonsky was 23 hired? 24 A No, I believe he wanted it done 25 because he wants decisions implemented.</p>

33 (Pages 126 - 129)

VERITEXT REPORTING COMPANY

212-267-6868

www.veritext.com

516-608-2400

<p style="text-align: right;">Page 138</p> <p>1 S. Kloepfer 2 during the October 20th meeting? 3 A Yes, and also it may have been 4 that Mr. Aubrey had mentioned that to me, 5 I just don't remember. But certainly Ms. 6 Jablonsky would have -- my knowledge of 7 when the reorg was contemplated, would 8 have come from Ms. Jablonsky or 9 Mr. Rizzuto or Mr. Aubrey. I just don't 10 remember.</p> <p>11 Q Did either Ms. Jablonsky or 12 Mr. Aubrey, whoever you first heard this 13 from, did they tell you what steps had 14 been taken since early August, up until 15 October 20th, if it was Ms. Jablonsky 16 that you learned it from?</p> <p>17 A I did learn, I believe in that 18 meeting, that there had been a couple 19 steps taken, in terms of posting job 20 descriptions and posting new positions 21 that were part of the reorg, that I 22 learned on or about this time because the 23 reorg, I understood, involved not only 24 the elimination of Mr. Baffo's function 25 and position, but the hire of two</p>	<p style="text-align: right;">Page 140</p> <p>1 S. Kloepfer 2 It wasn't my place, nor did I need to 3 know every job and title of who was going 4 to go where.</p> <p>5 Q That was my question, at that 6 time, did you have any understanding as 7 to whether or not those two new employees 8 were sought only as part of this 9 reorganization?</p> <p>10 A I didn't have an understanding, 11 nor would it have been material for me, 12 frankly.</p> <p>13 Q You mentioned that Ms. 14 Jablonsky -- you mentioned that you were, 15 on October 20th, correct me if I am 16 wrong, but during that October 20th 17 meeting, you were functioning to make 18 sure that the termination was legal under 19 state and federal laws; correct?</p> <p>20 A Once I learned that a job 21 function employee would be terminated, my 22 advice to my client managers was legal 23 advice, in my opinion.</p> <p>24 However, not all of the 25 discussions I had with Ms. Jablonsky</p>
<p style="text-align: right;">Page 139</p> <p>1 S. Kloepfer 2 additional persons at lower salaries, 3 plus the assumption by Mr. Redlich and 4 Mr. Rizzuto of additional 5 responsibilities formerly held by Mr. 6 Baffo.</p> <p>7 Q So it was your impression that 8 the job descriptions in the two new 9 positions, these two new employees were 10 going to be hired only as part of the 11 reorganization?</p> <p>12 A That's not what I said.</p> <p>13 Q I'm asking if that was your 14 impression.</p> <p>15 A I didn't really have a settled 16 impression. I was asked on the basis of 17 Mr. Baffo's job performance and the 18 reasons for the reorg for my advice on 19 whether the reorg could be, you know, was 20 lawful under New York State, city and 21 federal law and I didn't need to know all 22 of the ancillary details.</p> <p>23 The focus was really on Mr. 24 Baffo's job performance and on the 25 business reasons for the reorganization.</p>	<p style="text-align: right;">Page 141</p> <p>1 S. Kloepfer 2 between then and the 23rd of October, 3 were legal in nature. One of them being, 4 I'm sure you'll get into this, what would 5 be fair to Mr. Baffo now that we have 6 learned on or after the 23rd of October, 7 what would be fair in terms of a 8 severance offer, which I don't claim to 9 be legal advice, but much of the -- the 10 advice about whether the termination, 11 whether this reorg was a reorg or some 12 pretext for discrimination, that's a 13 legal question and I was acting in my 14 capacity as general counsel in advising 15 that.</p> <p>16 Q And is it your testimony that 17 that's why Ms. Jablonsky wanted to meet 18 with you on October 20th?</p> <p>19 A She would have known presumably 20 at that time, that having met with 21 Mr. Rizzuto and Mr. Aubrey about that a 22 termination was in the offering and being 23 the effective HR director she is, she 24 would have known that that would have an 25 implication for general counsel.</p>

<p>1 S. Kloepfer 2 The e-mail is dated 3 October 23rd and it's from Carol 4 Jablonsky to yourself? 5 A Yes. 6 Q Do you recall receiving this 7 e-mail? 8 A Yes. 9 Q Now, earlier that day on the 10 23rd, did you speak with Ms. Jablonsky? 11 A Yes. 12 Q What was the subject of that 13conversation? 14 MR. SPARBER: In accordance to 15 what I said earlier today and I 16 haven't objected to anything, I think 17 that it's NYIT's position that at 18 some point on October 23, 2009, that 19 Mr. Kloepfer's role changed and that 20 at some point on the morning of 21 October 23rd, Mr. Kloepfer, in my 22 words, put on his general counsel hat 23 and began to dispense legal advice 24 with respect to Mr. Baffo and the 25 situation.</p>	<p>Page 178</p> <p>1 S. Kloepfer 2 any indication as to when Mr. Rizzuto had 3 called her or spoken with her that 4 morning? 5 A I don't remember. She may 6 have, but my firm memory is that before 7 Ms. Jablonsky came up, literally walked 8 up to my office that morning, she had 9 talked that morning with Mr. Rizzuto. 10 Q And when she first came up to 11 your office between 8:30 and 9:00 a.m. 12 that morning, did she give you any 13 indication as to when Mr. Baffo had 14 spoken with Mr. Rizzuto earlier that 15 morning? 16 A I was told by Ms. Jablonsky and 17 later by Mr. Rizzuto, that the morning of 18 Friday, October 23rd, Mr. Baffo had told 19 Mr. Rizzuto that Mr. Baffo was HIV 20 positive. 21 Q And it's your recollection that 22 this would have occurred sometime before 23 8:30 on the 23rd? 24 A I got to work between 8:30 and 25 9 typically. I don't know precisely when</p>
<p>1 S. Kloepfer 2 And so to the extent you're 3 asking for conversations between him 4 and Ms. Jablonsky, I'm cautioning the 5 witness not to answer with respect to 6 any legal advice that he may have 7 dispensed. 8 I don't know what the answer to 9 your question is because he could 10 have said, do you want to go to lunch 11 or something, which of course he can 12 answer, but I'm not sure of the 13 answer to your question. And I'm 14 cautioning the witness, if it calls 15 for dispensing of legal advice, I 16 would instruct him not to answer. 17 A I'll do my best with those 18 guidelines. Ms. Jablonsky came up to see 19 me between 8:30 and 9:00 a.m. is my best 20 recollection, on Friday, October 23rd and 21 told me that Mr. Rizzuto had just that 22 morning told her that Mr. Baffo had just 23 that morning told Mr. Rizzuto that Mr. 24 Baffo was HIV positive. 25 Q And did Ms. Jablonsky give you</p>	<p>Page 179</p> <p>1 S. Kloepfer 2 Carol Jablonsky came to see me. I do 3 know she was preparing -- the plan had 4 been to announce this event to Mr. Baffo 5 at 10:00 a.m. that morning and I don't 6 know when she came to see me. 7 But I believe it was between -- 8 8:30 and 9:30 on Friday morning, 9 October 23rd is my best recollection and 10 therefore, she would have been told that 11 by Mr. Rizzuto before whenever she told 12 me. That's the best I can remember. 13 Q And when she came up to your 14 office -- strike that. 15 What was the reason she gave 16 you for coming up to your office? 17 A Because she had learned that 18 morning an entirely new piece of 19 information, namely, that Mr. Baffo was 20 claiming as of that morning, the 23rd of 21 October, that he was HIV positive and 22 that was a relevant piece of information 23 for the general counsel to know and also 24 both in my guise as general counsel and 25 as the supervisor of HR.</p>

<p style="text-align: right;">Page 182</p> <p>1 S. Kloepfer 2 So that's a piece of 3 information that I would have expected 4 the director of HR to tell me 5 immediately, especially since it was only 6 received an hour before we were slated to 7 eliminate the said employee, Mr. Baffo. 8 Q Did Ms. Jablonsky express to 9 you that she believed it was a relevant 10 piece of information for you to know? 11 A I don't recall, but it was 12 clearly a relevant piece of information. 13 She's an experienced Human Resources 14 director. As you will know, HIV status 15 is a disability under New York and other 16 relevant law and that was -- it goes 17 without saying that that piece of 18 information, learned literally within an 19 hour of terminating someone, is a 20 relevant piece of information that should 21 be and was shared with the general 22 counsel. 23 Q And when she came up to your 24 office that morning, was that the first 25 time you had spoken with her that morning</p>	<p style="text-align: right;">Page 184</p> <p>1 S. Kloepfer 2 say "from an HR perspective," what do you 3 mean? 4 A I mean from the decent 5 operation of an organization, that it was 6 not appropriate to go forward with the 7 termination literally an hour after 8 learning that the employee was infected 9 with HIV virus. I believe that, she 10 believed that and we agreed entirely on 11 that. 12 Q When you say "from an HR 13 perspective," you are differentiating 14 from a legal perspective? 15 A Yes, I am. I'm talking about 16 HR, the function of a Human Resources 17 Department is to help create a happy and 18 productive and fair workplace, that's 19 what you want the HR folks to do and at 20 which Carol Jablonsky is very good at. 21 And this is not a legal consideration 22 whatsoever. This is how do you treat 23 people at the workplace, even if you have 24 already determined for good and 25 sufficient reasons that their jobs would</p>
<p style="text-align: right;">Page 183</p> <p>1 S. Kloepfer 2 when she came up? 3 A I believe it was, yes. 4 Q Did she have -- 5 A She was either at deSeversky 6 that morning or she was called early at 7 her office from deSeversky by 8 Mr. Rizzuto. But the reason she was up 9 in my office, was Mr. Rizzuto's 10 conversation with her about what Mr. 11 Baffo had just told Mr. Rizzuto. 12 Q At that time she came up to 13 your office, did she express to you any 14 recommendation as to whether or not the 15 termination should go forward that 16 morning? 17 A I agreed with her from an HR 18 perspective, that it would not be 19 appropriate to institute a termination of 20 employee an hour after being told by the 21 employee that the employee was HIV 22 positive. Neither one of us thought that 23 that was humane, fair or appropriate. 24 Q I believe you answered my 25 question, but just so I'm clear, when you</p>	<p style="text-align: right;">Page 185</p> <p>1 S. Kloepfer 2 be eliminated or they would be 3 terminated, that there is a certain 4 standard of decency one lends to and 5 aspires to perform and so it's in that 6 sense that I mean HR. 7 Q And was this part of the 8 conversation you had with Ms. Jablonsky 9 that morning, this trying to do the fair 10 and right thing regarding the 11 termination? 12 A Yes, it's not been handed to 13 me, but we -- I had approved an earlier 14 severance package for Mr. Baffo, that was 15 not as generous as the one that is 16 attached to Kloepfer Exhibit 9. 17 The severance offer to Mr. 18 Baffo that is attached to Kloepfer 19 Exhibit 9, was enhanced because even 20 though we were entirely comfortable with 21 the legal and other reasons -- we were 22 entirely comfortable with the lawfulness 23 of our actions with respect to Mr. Baffo, 24 we empathized with his plight and 25 therefore, we offered him additional</p>

47 (Pages 182 - 185)

VERITEXT REPORTING COMPANY

212-267-6868

www.veritext.com

516-608-2400